them; they elected to say nothing and called no witnesses. The learned Magistrate found the defendants guilty, convicted them and sentenced them to imprisonment for one day and a fine of $500 each, and in default a further imprisonment for a period of five months.

The grounds of appeal with which it is necessary to deal are :—

(a) that the learned Magistrate was wrong in fact and in law in holding that the appellants were office-bearers of the Min Lok Club; and

(b) that the learned Magistrate was wrong in fact and in law in holding that the appellants did assist in the management of the said Club or had anything to do with what was going on at the said Club on the 11th February, 1956.

[The learned Judge stated the facts substantially as set out above and continued :]

Now in his grounds of judgment the learned Magistrate made a specific finding of fact that the three appellants were office bearers; he said :-

"After examining all the exhibits produced before the Court and scrutinizing the evidence for the prosecution very carefully, it is impossible for me to regard the story of the prosecution as other than proved beyond all reasonable doubt that the three accused were office-bearers of the Min Lok Club."

There is, however, no finding of fact that the appellants managed or assisted in the management of the said Club. All the learned Magistrate said was : On examination of the Register Book (Ex. P.7) I found that the number of members was increased when P.W.2 visited the Club from 15 to 54."

On the hearing of the appeal the learned Deputy Public Prosecutor argued that the words "did assist in the management of the above-named Society" used in the charge were unnecessary; he submitted that the words "managing or assisting in the management of any unlawful society" used in section 10 of the Societies Ordinance, 1949, qualify "any person" but not "office-bearer", and where the defendant is proved to be an "office-bearer" of an unlawful society he is guilty of an offence whether or not he has managed or assisted in the management of that unlawful society. The learned Magistrate found that the appellants were office-bearers of an unlawful society and was therefore right in convicting them.

The learned Counsel for the appellants, on the other hand, submitted that the words I have referred to above, as used in the charge, were essential ingredients to the offence under section 10 of the Societies Ordinance, 1949, as the words "managing or assisting in the management" qualify both "office-bearer" and "person". Very ingeniously he argued that his contention was supported by the provisions of the rules made under the Societies Ordinance that is the Societies (Registration) Rules, 1953 (L.N. No. 214 of 1953) where under rule 3 applications for registration as a registered or as an exempted society are to be made in Form 1 of the Schedule thereto and is to be signed by three principal office-bearers of the society. The learned counsel for the appellant submitted that if the words "managing or assisting in the management" do not qualify also "office-bearer" then any person who is an office-bearer for the purpose of signing the application for the registration of a society would, by virtue of the rules themselves, be made to commit an offence. I do not think there is any substance in this submission; the learned counsel for the appellants seems to have overlooked the provisions of rule 6(2) of the Societies (Registration) Rules, 1953. From these Rules it is to me clear that while it is in order for office-bearers to sign applications for registration under rule 3, they cannot thereafter under rule 6 perform any functions in connection with the society "excepting only application to or correspondence with the Registrar, unless such activity has been approved in writing by the Registrar".

I hold, therefore, that the words "did assist in the management of the abovementioned Society" used in the charge were unnecessary for an offence alleged to be committed by "office-bearers" against the provisions of section 10 of the Societies Ordinance, 1949.

The next point to consider is whether this error in the charge is material or not and whether the provisions of section 156 of the Criminal Procedure Code applies. Under that section an error in a charge is not material unless the accused was in fact misled by such error or omission. It seems from the grounds of judgment of the learned Magistrate that he did not consider the words in the charge referred to above were an essential ingredient in an offence under section 10 but he did not amend the charge at the close of the case for the prosecution and at that stage counsel for the defendant submitted that there was no case to answer on the ground that there was "no evidence to show that the accused managed or assisted in the management of the club and no evidence that all three accused arranged a meeting on behalf of the club." Under the circumstances I do not think it can be said that the appellants were not misled by the error in the charge. I, therefore, set aside the conviction and sentence and order re-trial before another Magistrate.

Re-trial ordered.

Re AL KAF SETTLEMENT

[O. C. J. (Whyatt C.J.) January 23, 1957]

[Singapore — Summons-in-Chambers No. 1019 of 1956]

Settlement — Trust to class of beneficiaries — Whether class is to be ascertained at a particular date or is to be ascertained from time to time when each periodical payment is made.

By a settlement made by Syed Mohamed bin Abdulrahman Alkaf and Syed Shaikh bin Abdulrahman Alkaf it was provided that the income of the trust property should be divided annually among such of the children or remoter issue of the settlors and of their deceased brother, Syed Abdullah bin Abdulrahman Alkaf "as shall from time to time be living during their respective lives, in the proportion of two shares to males and one share to females, but so that the issue of a deceased child shall take among them the share only which their parent or parents would have taken if living and in the same proportions as aforesaid between males and females." The trustees applied to the Court for construction of the settlement.

Held: (1) the class of beneficiaries in this case ascertained at each periodical payment and the income divided upon the existing state of things;

(2) that the trustees should distribute the income of the settlement each year among those persons who are living at the date of the annual division and fall within the class described in the settlement, namely the children or remoter issue of the settlors and of Syed Abdullah.

Cases referred to :—

(1) *In re Wenmoth's Estate* 37 Ch. D. 266.

(2) *In re Stephen, Kilby v. Betts* (1904) 1 Ch. 322.

SUMMONS in an Administratration Action.

T. E. Atkinson for the trustees.

G. J. Okell for Sharifah Aishah Alkaff person appointed to represent children and remoter issue of Syed Abdullah Alkaff.

N. A. Mallal for Syed Shaikh Alkaff person appointed to represent children and remoter issue of Syed Shaikh bin Abdulrahman Alkaff.

Whyatt C.J. : —These proceedings raise certain questions concerning the construction of a settlement which was made by Syed Shaikh bin Abdulrahman Al Kaf and his brother, Syed Mohamed bin Abdulrahman Al Kaf on the 21st December 1888. By this settlement the settlors conveyed certain properties estimated to be worth $350,000 to trustees and directed them to stand possessed of the income of the properties upon trust to pay the same to the settlors during their joint lives and after the death of either of them to the survivor, and after the death of such survivor, until the vesting of the corpus, upon trust to divide the income annually among such of the children or remoter issue of the settlors and of their deceased brother, Syed Abdullah bin Abdulrahman Alkaff "as shall from time to time be living during their respective lives, in the proportion of two shares to males and one share to females, but so that the issue of a deceased child shall take among them the share only which their parent or parents would have taken if living and in the same proportions as aforesaid between males and females."

It is clear from these words that after the death of the surviving settlor, the trustees are to divide the income of the settlement amongst a class of persons by means of annual periodical payments until such time as the corpus falls into possession. The class of persons is described as the children or remoter issue of the settlors and the said Syed Abdullah as shall from time to time be living during their respective lives. It was suggested in the course of argument that the gift was not to one class but to two classes, that is to say, to the children of Syed Shaikh and the children of Syed Abdullah, but in my judgment, there is nothing whatever in the language of the settlement to support this view. Furthermore the fact that the corpus is eventually to be distributed among the grandchildren of the settlors and Syed Abdullah, would seem to indicate, by analogy at least, that the settlors intended, by this settlement, to confer benefits on their issue and the issue of Syed Abdullah without regard to the particular ancestor from whom they are descended. Proceeding therefore, on the basis that there is only one class, the first question which arises is whether this class is to be ascertained at a particular date or is to be ascertained from time to time when each periodical payment is made in accordance with the then existing state of things. Although the answer on a point of construction must always depend upon the language used in the instrument which is being construed, it appears to me that some assistance may be obtained from cases in which the Courts have had to consider whether a class of beneficiaries who are entitled to income is closed at the date of the first distribution of income or whether it remains open, contracting or expanding according to the state of affairs existing at the date of each periodical payment of income.

In the case of *In re Wenmoth's Estate, Wenmoth and Wenmoth*(4), a testator directed his trustees to pay the income of his estate in equal shares to his grandchildren on their attaining the age of twenty-one, during their respective lives, and on the death of a grandchild leaving issue, to pay the share of the income of that grandchild to his or her children who should attain twenty-one or marry, and after the death of the last surviving grandchild, to distribute the corpus equally amongst the great-grandchildren. The question which Mr. Justice Chitty had to decide in that case was whether the class of grandchildren was closed when the eldest grandchild attained the age of twenty-one or whether it remained open so as to let in grandchildren born after that date, and in the course of his judgment the learned Judge drew an important distinction between a distribution of corpus and a distribution of income. "In the case of the distribution of corpus", he said "the trustees cannot ascertain what is an aliquot share of a member of the class until the class is closed, but in the case of a distribution of income the distribution is periodical. Each member of the class, as soon as

he becomes entitled, takes his share of the income .... I have no difficulty, therefore, upon principle in holding that in the case of a bequest of income among a class of children to be paid on their attaining twenty-one years, any child at any time attaining twenty-one years will be entitled to a share of the income." The decision of Mr. Justice Chitty was commented on and explained in *In re Stephens, Kilby v. Betts*[2] by Mr. Justice Buckley who stated that, in his view, it meant that as each periodical payment fell due it was to be divided upon the then existing state of things, "that is to say, in sevenths, and that when another periodical payment has fallen due, after another grandchild has been born, it is to be divided in eighths." The effect of these decision is summarised in *Jarman* on Wills (8th Edition) at page 1681 where the learned author states that when the income of a fund is given to the children of A on their respectively attaining the age of twenty-one, during their respective lives, the share of each child who has attained twenty-one is diminished from time to time whenever a younger child attains that age. It is clear, therefore, that where there is a gift of income and the distribution is *de anno in annum,* the class of beneficiaries entitled to the income can expand during the period of distribution so as to increase the number of shares into which the income is divided from time to time. And if a class can expand so also, by parity of reasoning, it can contract and thus diminish the number of shares into which the income is to be divided at periodical intervals.

Now in the present case the crucial words are "to divide the same (that is, the income) annually among such of the children or remoter issue of the settlors and of the said Syed Abdullah bin Abdulrahman Alkaff as shall from time to time be living during their respective lives." It will be seen that the wording is more explicit than in *Wenmoth's* case where there was no specific reference to an annual division among the members of the class as should from time to time be living, and it seems to me *a fortiori,* therefore, that in the present case the class should be ascertained at each periodical payment and the income divided, in the words of Buckley J., "upon the then existing state of things." Accordingly, therefore, I reach the conclusion that the trustees should distribute the income of this settlement each year among those persons who are living at the date of the annual division and fall within the class described in the settlement, namely, the children or remoter issue of the settlors and of Syed Abdullah. This description of the class is to be read, of course, along with the words which follow, namely, "the issue of a deceased child shall take among them the share only which their parent or parents would have taken, if living". But for these words the income would presumably have been divisible annually among the children or remoter issue *per capita,* but the effect of this provision is that when a child dies, the children of that child take as a group, the share of income which their parent would have taken if he or she had still been alive. Thus if there are four children alive at the date of an annual division, each child will receive one-fourth, but if before the next annual division, one child dies, leaving two children, then at the next periodical payment, the three surviving children will each receive one-fourth and the remaining fourth will be paid to the two children of the deceased.

I now turn to consider the application of this construction to the facts placed before the Court in these proceedings. Syed Shaikh died on the 31st March 1910 leaving eleven children and a grandchild who was the daughter of a deceased daughter. Syed Mohamed and Syed Abdullah had died previously, the former leaving no children, the latter leaving six children, all of whom were alive at the date of Syed Shaikh's death. Thus if there had been an immediate distribution at that date, the division would have been into eighteen parts; eleven parts to the children of Syed Shaikh, six parts to the children of Syed Abdullah and one part to the daughter of the deceased daughter of Syed Shaikh. Shortly after Syed Shaikh's death, one of his children, Syed Ahmed, an infant of four years, died on the 6th April 1910. Consequently when the first annual division after Syed Shaikh's death took place, the class among whom the income was to be distributed comprised only ten children of Syed Shaikh; the remaining members of the class were the same as at the date of Syed Shaikh's death, namely, six children of Syed Abdullah and one grandchild, the daughter of Syed Shaikh's deceased daughter. Accordingly, therefore, the income fell to be divided at that time among seventeen members of the class. The trustees did, in fact, follow this course, and in my judgment, they were clearly right in doing so.

After the death of Syed Ahmed, it would seem from the affidavit of the trustees that no further difficulties were encountered in distributing the income until 1943. On the 6th November 1943 Syed Shaikh's grandchild died without leaving any children. During her lifetime, she had been a member of the class of beneficiaries, receiving a share of the income at each periodical division, and since she was the only issue of a deceased daughter of Syed Shaikh, her share had been equal to the whole of the share which her mother would have received if she had still been alive. After the death of this grandchild in 1943, the class contracted, just as it had contracted in 1910 when the child, Syed Ahmed, died, and therefore the next annual division fell to be made on the basis that the number of members of the class had been reduced by one. It is in my view, a misconception and inaccurate to speak of the

share of this grandchild in the income going over to other beneficiaries on her death; all that happened was that she ceased to be a member of the class of beneficiaries and therefore the income fell to be divided among a reduced class of beneficiaries at the next and subsequent annual divisions.

I should perhaps mention that the affidavit of the trustees shows that the mother of this grandchild was married to a son of Syed Abdullah and therefore she was the grandchild of both Syed Shaikh and Syed Abdullah, but as the summons raises no question for my decision on this aspect of the facts I make no further reference to it in this judgment.

It was suggested in the course of argument that the judgment of Mr. Justice Taylor in Originating Summons 249 of 1953 might affect the answers to the questions raised in this summons. I have examined the judgment in that case and the formal order drawn up subsequently and it seems to me that the formal order went somewhat further than the judgment upon which it is based. But whether that be so or not, it is quite clear that any observations relating to questions other than the distribution of income among the issue of a deceased child of Syed Shaikh or Syed Abdullah *inter se* are *obiter*, and consequently do not govern the decision in the present proceedings.

For these reasons, therefore, I hold that after the death of Syed Ahmed in 1910, and likewise after the death of the grandchild of Syed Shaikh in 1943, the income fell to be divided at the next and subsequent annual divisions among such of the children or remoter issue of Syed Shaikh and Syed Abdullah as were living at the time of such divisions, subject to the limitation that the issue of a deceased child of Syed Shaikh or Syed Abdullah should take only the share which their parent or parents would have taken, if living.

I order the costs of the parties, as between solicitor and client, in these proceedings to be paid out of the estate.

Order accordingly.

Solicitors: *Allen & Gledhill; Braddell Bros.; Mallal & Namazie.*

LIM PONG JOO v. REG.

[A. Cr. J. (Rigby J.) February 8, 1957]

[Penang — Criminal Appeal No. 41 of 1956]

Common Gaming Houses Ordinance, 1953, ss. 2 & 4(1)(b) — "Gaming" — What evidence necessary.

To establish an offence under section 4(1)(b) of the Common Gaming Houses Ordinance, 1953, there must be evidence that the playing of the game involved an opportunity to the successful player to recover money or money's worth within the definition of "gaming" under section 2 of the Ordinance.

MAGISTRATE'S CRIMINAL APPEAL.

Lim Cheng Poh for the appellant.

F. G. Cooke (Federal Counsel) for the respondent.

Rigby J.: — The appellant in this case was convicted of an offence that he being the occupier of certain premises, did permit those premises to be used by another person as a common gaming house and that he had committed an offence under section 4(1)(b) and punishable under section 4(1) of the Common Gaming Houses Ordinance, 1953. Upon conviction he was fined $500 or two months' imprisonment.

The premises in question appear to have been a coffee shop. The very brief facts of the case were that a Police Inspector entered the shop and found a male Chinese operating a pin-table therein. The man was placing 20 cent coins into the slot of the machine. The Police Inspector watched him playing for some ten minutes and then took proceedings under the Common Gaming Houses Ordinance. The male Chinese who had been found playing on the pin-table gave evidence for the prosecution. He admitted that he was playing by putting 20 cent pieces into the machine. He stated, however, that he got no prize for the game if he succeeded in winning. A Police Officer, who was apparently fully conversant with the operation of these machines, gave evidence for the prosecution as to the manner in which the machines were operated and the game was played. No doubt through inadvertence on the part of the prosecution he did not, however, give any evidence as to what was the position if the player operating the pin-table was successful; that is to say, what prize, if any, the successful player obtained.

The learned Deputy Public Prosecutor does not seek to support the conviction on the sole ground that there was no adequate evidence before the learned Magistrate that the playing of the game involved an opportunity to the successful player to recover either money or money's worth within the definition of "gaming" under section 2 of the Common Gaming Houses Ordinance.

The appeal is accordingly allowed and the conviction set aside. I direct that the fine of $500 be refunded to the appellant.

Appeal allowed.

Solicitors: *Pillai, Lim, Lee & Hwang.*